THE LAWYER'S MIND: MAKING DECISIONS

ROBERT A. CREO practiced as an in-house corporate lawyer and a solo and small firm general practitioner before becoming a full-time neutral. He has acted as a mediator and arbitrator in thousands of cases, including as a salary arbitrator for Major League Baseball, a grievance arbitrator for the National Football League, and a hearing officer for the US Senate Select Committee on Ethics. He has been on the mediator roster of the Court of Arbitration for Sports, Lausanne, Switzerland, which provides ADR services for international sports, including the Olympics. He serves as adjunct professor at Duquesne University School of Law and was an adjunct for many years at the University of Pittsburgh School of Law. He is the 2018 recipient of the PBA ADR Committee Sir Francis Bacon Alternative Dispute Resolution Award. He is annually named as a Super Lawyer and included in Best Lawyers in America where he was recognized as the mediator of the year in 2014 and 2017, and for arbitration for 2021 for Pittsburgh. He has a passion for storytelling and is the principal of Steel City Storytellers, LLC (www.steelcitystorytellers.com). He is also the principal of Happy! Effective Lawyer LLC (happyeffectivelawyer.org). His website is www.robertcreo.com.

Lawyer unfamiliarity, misconceptions and personal defensiveness about decision-making processes impede professional development and limit the effective representation of clients. We often deflect criticism, resist changing our opinions, avoid feedback, and stay the course despite mounting evidence that things are not going so well. Lawyer toolkits overflow with aggression, avoidance, intimidation, blaming, deflecting, and other competitive tactics, which often do not work and only energize or entrench the opposition. Many highly successful people lack self-awareness and resist behavioral changes that can enhance problem-solving skills.

This article explores judgment, decision-making theory and practice, persuasion skills, and mental hardwiring, including cognitive defaults and biases that impact choices, advice, and courses of action in client representation. The current series explores judgment, decision-making, and persuasion skills.

Once a cat sits on a hot stove, it will never sit on one again, or a cold one.

—Mark Twain

HOW WE THINK

We are creatures of our experience. Being "burned" once can sear the experience into our memory such that avoidance of adverse consequences becomes the automatic or default in decision-making. Research continues to show that the overwhelming majority of people value the avoidance of loss more than the reward of comparable gains. Loss aversion is one of many cognitive biases that affect our decision-making process and negatively impact critical and reflective thinking.

Humans strive for coherency and cogency. We rely on structure, routine, and pattern recognition to conserve energy and quickly make choices for self-preservation and efficiency. Lawyers, for example, consciously or unconsciously develop "decision habits," which act as guides for tactical choices made during the course of representing a client. Counsel thrive in the flow of events, sometimes referred to as the "valley of the normal," where things are neither unexpected nor surprising. The legal system operates in the context of base values and communal experiences. As one law student of mine commented, the rules of courtroom procedures do not have to expressly prohibit counsel from punching the judge following an adverse ruling.

Common sense and cultural norms are unspoken and form the informational foundation for action, but this is not enough to resolve disputes. No matter how much discovery is conducted, including the boiler-shop review of vast quantities of electronic communications, information will be incomplete, contextual, or rationalized in hindsight. It is easy to

unintentionally conflate correlation with causation, especially in the realm of legal advocacy. Whenever there is causation, there is correlation but not the inverse. An acquaintance commented that the Steelers always win or lose when he is present or wearing a specific item of clothing, but this correlation does not equal causation. Most of us want to believe we have more agency and impact on what is happening, when, in reality, we have nothing to do with it.

Another aspect of this decision error is "causal thinking." When something new happens, the human mind streams it into an inevitable chain of events triggered by an earlier event, despite numerous other factors having intervened to affect the outcome. Once the outcome is known, causal thinking results in an explanation for the event-chain being linked and predictable. As the authors of the book *Noise, A Flaw in Human Judgment* point out, causal mode comes more naturally where causality is plausible. Minds easily turn some correlation, however low, into a causal and explanatory force. Reliance on flawed explanations occurs when the alternative is to reduce understanding of our world and ourselves. Inherent in complex disputes is the presence of conflicting signals, clues, and cues (i.e., noise working against the biological drive for coherence). The inherent need to create patterns and coherency blurs circumstances and context, like the cat that is unable to discern a cold stove from a hot one. Lawyers may too quickly dismiss viable options and tactics by not taking the time and energy to identify and assess the nuances of the facts or dynamics of the stakeholders.

Many of us have faced the difficult task of explaining consequential damages and articulating foreseeability to clients and juries. When there are unexpected but unsurprising outcomes, a narrative in hindsight creates a coherent and reasonable story. Because the event explains itself in the context of later activities, our hindsight bias creates an illusion that the event could have been predicted, and we conclude that it was reasonably foreseeable.

Advocates with an eye to dispute resolution and litigation focus on building narratives, illusory or not, and creating causation to explain the past so that liability and responsibility can be apportioned in a manner favorable to the client. This involves dissecting past relationships to find patterns and correlations in search of causation and provable consequential damage, so that these stories, theories, or themes of the case create victims and villains to shift responsibility from one client to others. Transactional representation involves the forecasting and allocation of risk within the business and cultural norms of the substantive area or business sector. The goal is to avoid surprises and to manage and navigate potential abnormalities while assigning future responsibility to each participant in the transaction. Compliance lawyers are a subset of transactional lawyers whose area of expertise is administrative and regulatory advocacy, advising clients operating within the designated and acceptable mandates of regulations.

HOW WE THINK WE THINK

Causal thinking creates an illusion of understanding the past, which, in turn, contributes to overconfident predictions of the future. We think we understand what is happening. We conclude that we could have predicted an outcome with more careful judgment. Mentally, we minimize the impact of what is unknown and the role of randomness (or luck) while we dissect the past. Lawyers work with what they have, which is what may have occurred, what is provable, and subjective criteria like justice, values, or normative considerations of how people should act when confronted with new stimuli or unusual patterns. There are inflating and deflating factors in any subjective evaluation of the past or prediction of the future. We may generate a list of these factors, but we are unable to forecast how they will be weighted by the decider in a negotiation, or administrative or adjudicatory process. Facts, metaphors, and oratory may create an image or story with coherence and glue, but it is impossible to predict the relative values assigned to each of these by another person.

HOW WE COMMUNICATE

There is a story, probably not accurate, about how President Kennedy made the decision to invade the Bay of Pigs to disastrous results. A general responded to Kennedy's question about the likely outcome of the military operation by stating there was a "fair" chance of success. Kennedy interpreted this to be well above a 50 percent likelihood, while the general believed it had only a 30 percent probability of success. Had they assigned the same value to the subjective language, the invasion would not have gone forward. This has always borne out in my classes when my students have answered anywhere from 20 to 75 percent when they have been asked to assign a percentage of probability to "fair." The purpose of subjective adjectives is to be descriptive and to paint a picture or create a pattern with a few words, yet the reality is that there are a limited number of pixels in any image and our individual brains process stimuli differently. Words such as rich, good, great, excellent, or outstanding, or legal concepts like good faith, undue influence, reasonable person, and foreseeability hold different meanings for us all. This type of risk analysis in terms of forecasting is so "noisy" that it has little or no value. Although framing in terms of percentages appears to be more grounded in logic or scientific basis, it is usually just speculation since the probabilities are raw estimates subject to a full chorus of cognitive biases and defective thinking.

Loss aversion and pursuit of the illusion of perfect information lead only to suboptimal choices or indecision paralysis, which results in delaying proactive actions in favor of being reactive. There is a tendency when faced with multiple paths to procrastinate and wait for something to guide us or force a choice. I believe that inaction should be a deliberate choice after a critical analysis that identifies specific acts or dynamics that should operate to the advantage of your client. A pause is a strategy or tactic under your own control and should include your unilateral ability to end it. Of course, delays are often imposed by the court system or the inability of someone to act in a timely manner. Under these circumstances, the lawyer must be vigilant and consider all next steps.

WHAT TO DO

The authors of *Noise* prefer a process of comparative judgment where two items are viewed side-by-side and then one is chosen as superior. The next item is then compared, so that the most acceptable choice from the pool rises to the top. Their contention is that comparisons between specific objects support finer discriminations than do ratings of objects evaluated one at a time. Social scientists refer to it as an intensity scale. This is the process that optometrists use when determining the lens prescription. We look through two lenses in rapid succession and decide which one is clearest, then the winner stays to face another challenger in a process of ranking and elimination.

Although recognizing outliers and drawing the ends of the bell curve or scale may not be difficult, using comparisons is superior. The gradations in comparison should create an order of options at the end of the process (i.e., the resultant intensity scale). The challenge is in creating a finite number of options that can be identified as separate and unique choices or outcomes. A strength of this model is that if percentages or values are assigned at all, this rating does not occur until the problem and risk analysis are viewed in a holistic manner. Individual risk tolerance, which includes loss aversion, is integral to the comparison model since it is already ingrained into our thinking and is likely to be applied in the same manner between any two choices.

I have used this model in the grading of law school exams or research papers, even when they are on different topics. When only two papers are reviewed together, it is easier for me to choose which of the two is superior to the other. By an iterative process with many pairings, I can then categorize the student work into three groups: the likely A, B, and below-B grades. My fundamental assumption is that the best papers earn an A+ or A, which allows me to work downward with the others. Usually, one or two stand out from the pack and give me the benchmark. It becomes simpler to refine within each grade if it is plus or minus, so the gradations between an A- and B+ are not arbitrary or unreasonable.

This type of model has been a core part of my approach to resolving commercial or transactional disputes where there are multiple considerations and differentiations regarding the economic consequences of a verdict or award to the parties. In a multi-issue conflict, the participants are asked to identify all elements of the matter and potential outcomes. An intensity scale is then devised, resulting in a de facto order. The next step may be to ask participants to draw a pie chart with each factor representing a slice of whatever size. They often take a few stabs at it before resting on a depiction of their optimal goals. I have also used this method to identify risks and negative outcomes and, in cases with multiple defendants, to get a sense of how the stakeholders view the apportionment of responsibility. These are all tools easily used without technology, algorithms, perfect knowledge, or artificial intelligence to reduce noise and improve judgment.

A major obstacle to improving our decision-making skills is the inability to accurately evaluate our own performance, turn a critical focus onto ourselves, recognize our own contribution to poor quality outcomes, and learn how to reach across disciplines to change behavior. In recent years, researchers have made rapid progress in the "Decision Sciences," including the hard wiring of the brain and cognitive bias involved in judgment, negotiation, and conflict resolution.

DECISION ERROR AND COGNITION

There are many cognitive defaults and biases in decision-making. Cognitive bias distorts reasoning, creates misperceptions, affects evaluations, and results in errors in decisions and outcomes. These cognitive traps must be recognized and respected. Common ones confounding lawyers and clients alike are overconfidence and confirmation bias. Cognitive research has made its way into popular culture and nomenclature with confirmation bias being referred to by news commentators, pundits, television sitcoms, and other media. In my research and experience, cognitive biases blur reflective thinking and influence the lawyer to reject dialogue, compromise, or alternative solutions as signs of weakness.

As discussed above, decisions (and resulting decision error) involve not only creating a persuasive narrative on causation about past events but also predicting the future, including whether a court, administrative agency, or governmental entity will buy your story. Failure fits within the definition of decision error—the traveled path was a disappointment or a dead end. Forecasting is part and parcel of the business of lawyering. In predicting outcomes, lawyers, like most professionals, are often overconfident. When confronted with objective evidence of their predictive shortfalls, many professionals insistently defend their initial positions and refuse to change their minds instead of reassessing and improving their skills. To preserve the illusion of competence after encountering disconfirming evidence, even recognized experts in a field will deflect criticism and generate a series of rationalizations to justify their prior opinions and intended course of action.

OVERCONFIDENCE

The "overconfidence effect" permeates decision-making by professionals and experts. Attorneys are educated to project confidence and to sow no doubt on the force of their argument or the justness of their positions. Perhaps it can be summed up best by singer-songwriter Katy Perry who stated, "If you're presenting yourself with confidence, you can pull off pretty much anything." We have all seen lawyers who boldly boast of future victory while blithely dismissing any conflicting facts or viewpoints.

The more the lawyer expresses confidence with subjective words (e.g., "no way to lose" or "slam dunk") or percentages (e.g., 95 percent chance of success), the greater the likelihood of decision error. In other words, when advocates say that they are 100 percent confident in their position or prediction, the error rate is higher than when they opine that they are 75 percent confident. This is math mixed with common sense.

Confirmation bias impacts the search for information, the interpretation of information, the recollection and memory of events, and the recounting of facts or events. Confirmation bias is the natural

reaction to discount information that is inconsistent with our beliefs, memory, or goals. Our minds block or distort information that challenges our prior decisions or how we view the world. It is an underestimation of the impact of unfavorable facts and an overweighing of favorable ones, leading us to continually reinforce our prior beliefs or decisions. Lawyers are especially vulnerable since our ethical duty is to further our clients' goals by creating a plausible and reasonable narrative to fit the uncontested facts and legal principles. Lack of enthusiasm for the client's cause may be perceived as an unwillingness to fight for justice and impact negatively on the lawyer-client relationship. When opposing counsel prefaces a refusal to cooperate with the words: "My client has directed me to …," that is usually a signal that he is knowingly advancing an untenable position. No lawyer wants to appear "weak" for fear of losing leverage in negotiations, yet attempts to strike a balance by preserving personal credibility and reputation are often unsuccessful.

Overconfidence usually involves miscalculation of risk, substitution of subjective probabilities, or an unrealistic assessment of personal abilities. Most researchers accept that overconfidence involves:

- Overplacement of one's performance relative to others;
- Overprecision in expressing unwarranted certainty in the accuracy of one's beliefs; and
- Overestimation of one's actual or predictive performance.

Overplacement is common, with most professionals believing they are superior to their peers (although it is impossible for everyone in a peer group to be better than the average when compared to the others). This is sometimes called the "illusion of superiority" and is perhaps the most prominent manifestation of the overconfidence effect.

Overprecision is the excessive confidence that one knows the exact truth or can predict or estimate the outcome of future events. Studies have shown that accuracy rates are often as low as 50 percent when people predict future outcomes despite being at least 90 percent confident in those outcomes.

Overestimation involves certainty of belief in one's own ability, performance, level of control, or success. This includes the illusion of control, which often includes acting as if one has significant impact or control over events or decisions of others, despite this being unrealistic.

Lawyers seek patterns—squeezing the puzzle pieces into place to create the picture that leads to an acceptable resolution of the client's problems. Creativity in bending or spinning facts and figures molds the theory of the case. There is a tipping point in the course of a long representation of a challenging position or client where the lawyer actually believes the narrative. When this occurs, there is a risk that the confirmation bias blinds both counsel and the client. As noted by Professor Daniel Kahneman, "Overconfident professionals sincerely believe they have expertise, act as experts and look like experts. You will have to struggle to remind yourself that they may be in the grip of an illusion."

WHAT TO DO?

Stop and engage in critical reflection. Cognitive research indicates that it usually takes time for people to assimilate new information that is different than what they believe. Cognitive dissonance creates internal stress, so the mind must react to the tension of conflicting information or beliefs. Do not brush aside your cognitive discomfort or try to reconcile the unreconcilable. My own model, mostly developed with Selina Shultz when we were co-teaching at Duquesne University School of Law, focuses on the following questions to explore when assessing information that discredits your client or theory of the case:

- Who is aware of the information and its source?
- Is the information believable on its face?
- Can it meet the evidentiary standards for admission and the burden of proof?

- Can the information be reconciled with a modified or new theory of the case?
- Can the client and lawyer view this information objectively and with detachment?
- Are we sufficiently open and not attached to outcome to seek a negotiated resolution that recognizes the new information devalues the case or limits options?

If the information is compelling and goes to the heart of the matter or relationship between the stakeholders, then starting over may be the best option. There are other ways to address overconfidence. A post by the Program on Negotiation at Harvard Law School on its "Daily Blog" included this:

> To avoid the pitfalls of overconfidence, you need a clear understanding of how overconfidence is likely to affect your judgments and decisions (and those of your counterparts) at the bargaining table. Here are four pieces of advice that current negotiation research offers to reduce your overconfidence:
>
> 1. Collect information.
>
> 2. Consider the opposite.
>
> 3. Find a devil's advocate.
>
> 4. Don't be afraid to ask.[1]

This is sound advice for transactional and other interest-based bargaining. My experience as a mediator in thousands of cases is consistent with these guidelines. The core elements of mediation training and best practices are encompassed within the above four points, particularly the concept of the mediator being the "agent of reality" or playing the role of devil's advocate in a caucus model.

MEDIATE?

Social scientists agree that new information presented from a neutral or objective source or a higher authority is accepted more easily than from a distrusted source. The more detailed the information, the more likely it is to be influential. Although much has been written about mediation and cognitive bias, and most skilled mediators have a working knowledge of the psychology of human behavior and decision-making, the mediation process for litigated claims has evolved, with mediators becoming less passive and more evaluative and directive. It is difficult and time-consuming to move an overconfident advocate from an entrenched position by only facilitative questioning. This thrusts the role of devil's advocate to the forefront since, ironically, the effective devil's advocate must have some level of confidence in the positions being advanced by forceful and pointed questioning and comments. When coupled with what I believe is the better view propounding mediator transparency and openness over tactics and disguised strategy, mediators may by necessity become more evaluative and helpful to the parties, despite their protestations to the contrary.

Plaintiffs and their counsel are affected by cognitive biases, usually unconsciously, although enough has been written about them in the legal and popular press that some attorneys do acknowledge them and use mediators to assist in the search for a fair resolution of a claim. This is arguably an underpinning of the growing popularity of "evaluative" mediation for cases subject to litigation. The mediator is not under the weight of the confirmation or other biases, emotional factors, and personality clashes that may have developed during the course of litigation. Impartiality includes the absence of many of the cognitive biases, irrational thought patterns, and emotional strains that attach to disputants and their representatives operating in the arena of advocacy and uncertainty.[2]

Notes

1 Program on Negotiation Harvard Law School, Business Negotiation Skills to Curb Your Overconfidence (Feb. 9, 2023), https://www.pon.harvard.edu/daily/business-negotiations/business-negotiations-skills-tips-curb-your-overconfidence/.

2 For additional reading, see Dan Ariely, Predictably Irrational, The Hidden Forces That Shape Our Decisions (Harper, 2008); Robert H. Baron, Don't Be So Sure, The Penn. Lawyer, (May/June 2020); Robert A. Creo, A Pie Chart Tool to Resolve Multiparty, Multi-Issue Conflicts, 18 CPR Alternatives, No. 5, 89 (May 2000); Daniel Kahneman, Thinking, Fast and Slow (Macmillan, 2013); Daniel Kahneman, Don't Blink! The Hazards of Confidence, The N.Y. Times, (Oct. 19, 2011); Daniel Kahneman, Oliver Sibony, and Cass R. Sunstein, Noise, A Flaw in Human Judgment (Little Brown Spark, 2021); Randall Kiser, How Leading Lawyers Think: Expert Insights Into Judgment and Advocacy (Springer, 2011); Richard P. Larrick, Katherine A. Burson, and Jack B. Soll, Social comparison and confidence: when thinking you're better than average predicts overconfidence (and when it does not), 102 Organizational Behavior and Human Decision Processes, No. 1, 76 (2007); Don Moore and Derek Schatz, The Three Faces of Overconfidence, 11 Social and Personality Psychology Compass, No. 8 (Aug. 2017); Program on Negotiation Harvard Law School, Are You an Overconfident Negotiator?, (Dec. 5, 2012), https://www.pon.harvard.edu/daily/business-negotiations/are-you-an-overconfident-negotiator; Nate Silver, The Signal and the Noise, Why So Many Predictions Fail—But Some Don't (Penguin, 2012); Philip. E. Tetlock and Dan Gardner, Superforecasting: The Art and Science of Prediction (Crown, 2016).